

Issue: Administrative Review of Hearing Officer's decision in Case No. 10160; Ruling  
Date: November 5, 2013; Ruling No. 2014-3747; Agency: Department of  
Corrections; Outcome: Hearing Decision in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resources Management*  
*Office of Employment Dispute Resolution*

**ADMINISTRATIVE REVIEW**

In the matter of the Department of Corrections  
EDR Ruling Number 2014-3747  
November 5, 2013

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management administratively review the hearing officer’s decision in Case Number 10160. For the reasons set forth below, EDR will not disturb the hearing officer’s decision.

FACTS

The relevant facts in Case Number 10160, as found by the hearing officer, are as follows:<sup>1</sup>

The Department of Corrections employed Grievant as a Corrections Officer at one of its facilities. He had been employed by the Agency for approximately 15 years prior to his removal effective July 10, 2013. Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on July 28, 2011.

Employees may not bring food into the Facility. They receive one free meal per day. Inmates may eat in the inmate dining area but may not take food from the dining area to their living units. When inmates leave the dining area to return to their housing units, they go through a “shake down” to ensure that they are not taking food from the dining area to their housing units.

On June 23, 2013, Grievant was in the staff dining area with the Inmate. Grievant asked the Inmate to make him a sandwich “to go.” The Inmate asked Grievant if the Inmate could make a sandwich for himself. Grievant said the Inmate could do so. The Inmate made a sandwich for Grievant and for himself. The Inmate placed his sandwich in a brown paper bag. The Major entered the dining area. Both the Inmate and Grievant knew they were not supposed to take food out of the dining area. Grievant ate his sandwich while he was in the dining area instead of taking it to his work area. The Inmate waited until the Major left and gave the brown paper bag to Grievant and asked Grievant to take the bag to Housing Unit 6. The Inmate did not reside in Housing Unit 6, but Grievant was

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<sup>1</sup> Decision of Hearing Officer, Case No. 10160 (“Hearing Decision”), October 3, 2013, at 2-3.

not aware where the Inmate resided so he did not question the Inmate's request to take the bag to Housing Unit 6. Grievant took the bag to Housing Unit 6. Once Grievant took the bag out of the dining area, the bag became contraband. Grievant gave the bag to Officer B who was working inside the control booth with Officer H. Grievant told Officer B that the bag contained a sandwich for the Inmate and asked Officer B to give the bag to the Inmate when the Inmate came to the Control Booth in Housing Unit 6. After the Inmate finished working in the dining area, he passed through "shake down" and walked to Housing Unit 6. He approached Officer B and asked Officer B if he was "holding something" for the Inmate. Officer B said "yea, yea" and then passed the brown paper bag containing the sandwich through the tray slot to the Inmate. The Inmate took the bag and walked out of the Housing Unit.

Officer H was in the control booth with Officer B and recognized that it was inappropriate to give the bag to the Inmate. Officer H reported the incident to a Facility manager.

On July 10, 2013, the grievant was issued a Group III Written Notice of disciplinary action with removal for fraternizing with an offender.<sup>2</sup> The grievant timely grieved the disciplinary action, and on October 3, 2013, following a hearing, the hearing officer issued a decision upholding the Group III Written Notice with removal.<sup>3</sup> The grievant has requested administrative review of the hearing officer's decision by EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to ... procedural compliance with the grievance procedure."<sup>4</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>5</sup>

In his request for administrative review, the grievant argues that the hearing officer's mitigation analysis was flawed. Specifically, he claims that the hearing officer erred in failing to find that the grievant had been treated inconsistently with other similarly situated employees and in failing to consider the grievant's truthfulness and prior satisfactory service.

By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."<sup>6</sup> The *Rules for Conducting Grievance Hearings* (the "Rules") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management

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<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 1, 5.

<sup>4</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>5</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>6</sup> Va. Code § 2.2-3005(C)(6).

that are found to be consistent with law and policy.”<sup>7</sup> More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

(i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency’s discipline was consistent with law and policy, the agency’s discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>8</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.<sup>9</sup>

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management’s discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.<sup>10</sup> EDR will review a hearing officer’s mitigation determination for abuse of discretion,<sup>11</sup> and will reverse only where the hearing officer clearly erred in applying the *Rules*’ “exceeds the limits of reasonableness” standard.

The grievant’s request for administrative review alleges that the agency did not apply disciplinary action to him consistent with other similarly situated employees, and that the hearing officer erred by failing to consider this evidence in his mitigation analysis. Section VI(B)(2) of the *Rules* provides that mitigating circumstances may include “whether the discipline is consistent with the agency’s treatment of other similarly situated employees.” As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.<sup>12</sup>

In this case, the hearing officer concluded that the grievant “was disciplined for assisting the Inmate by taking contraband out of the dining area and returning it to the Inmate at a location of the Inmate’s choice.”<sup>13</sup> The hearing officer found that while the grievant had presented arguments regarding security staff removing food from the dining area and inmates being allowed to make food for themselves, the grievant had failed to show inconsistent treatment of employees at the grievant’s facility who had engaged in the comparable behavior of

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<sup>7</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>8</sup> *Id.* at § VI(B).

<sup>9</sup> *Id.*

<sup>10</sup> The Merit Systems Protection Board’s approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

<sup>11</sup> “‘Abuse of discretion’ is synonymous with a failure to exercise a sound, reasonable, and legal discretion.” Black’s Law Dictionary 10 (6th ed. 1990). “It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts . . .” *Id.*

<sup>12</sup> *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

<sup>13</sup> Hearing Decision at 5.

“transport[ing] food to a housing unit for an inmate’s benefit.”<sup>14</sup> A review of the hearing record supports the hearing officer’s finding. We therefore cannot conclude that his mitigation analysis was flawed in this respect or in any way an abuse of discretion. Accordingly, we decline to disturb the decision on this basis.

Likewise, we are not persuaded by the grievant’s argument that his truthfulness and prior satisfactory service should have supported mitigation. Although presumably assessed as to credibility of testimony and an admirable trait, truthfulness will rarely, if ever, meet the high burden of mitigation under the “exceeds the limits of reasonableness” standard by itself. In addition, while it cannot be said that prior satisfactory service *never* relevant to a hearing officer’s decision on mitigation, it will be an extraordinary case in which it could adequately support a hearing officer’s finding that an agency’s disciplinary action exceeded the limits of reasonableness.<sup>15</sup> The weight of an employee’s length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee’s past actions and service, and how they relate and compare to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, the grievant’s prior satisfactory service and truthfulness are not so extraordinary that they justify mitigation of the agency’s decision to dismiss the grievant for conduct that was determined by the hearing officer to be terminable due to its severity.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR will not disturb the hearing decision in this case. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer’s original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>16</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>17</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>18</sup>



Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>14</sup> *Id.*

<sup>15</sup> See EDR Ruling No. 2013-3394; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.

<sup>16</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>17</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>18</sup> *Id.*; see also Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).